

In the
United States
Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

GEORGE RUMEH,

Appellee.

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

Upon Appeal from the District Court of the United
States for the District of Arizona.

APPELLEES' ANSWERING BRIEF

KRUCKER & EVANS,

DAVID J. SMITH,

57 North Church,

Tucson, Arizona,

Attorneys for Appellee, George Rumeh.

HALL, CATLIN & MOLLOY,

1010-1013 Valley Nat'l Bldg.,

Tucson, Arizona,

Attorneys for Appellee, Bertha Lucille Rhodes.

AUG 16 1949

PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	Page
I. Jurisdictional Statement	2
II. Statement of the Case.....	2
III. Argument	6
I. Plaintiffs failed to establish any act upon the part of the defendant sufficient to constitute actionable negligence	6
II. The efficient and proximate cause of plaintiffs' injuries was the negligent act of a third person and not an act of the defendant	15
III. The accident was unavoidable as defend- ant was confronted with a sudden emer- gency and exercised its best judgment under the circumstances	26
IV. The amounts awarded plaintiffs were excessive and the verdicts were rendered under influence of passion or prejudice.....	29

TABLE OF CASES AND AUTHORITIES CITED

Cases

	Page
Alabam Freight Lines v. Phoenix Bakery, Inc., 64 Ariz. 101; 166 Pac. (2d) 816.....	14
Alexander v. Pacific Greyhound Lines, 65 Ariz. 187; 177 Pac. (2d) 229	15
Arizona Cotton Oil Co. v. Thompson, 30 Ariz. 204; 235 Pac. 673	7
Apache Railroad Co. v. Shumway, 62 Ariz. 359; 158 Pac. (2d) 142; 159 A. L. R. 857.....	20
Bass Drilling Co. v. Ray, 101 Fed. (2d) 316, 321.....	22
Bell v. Carter Tobacco Co., 41 N. M. 513; 71 Pac. (2d) 683	13
Chicago, R. I. and P. Ry. Co. v. DeVore, 43 Okla. 534; 143 Pac. 864; L. R. A. 1915F 21.....	35
Clay v. Texas-Arizona Motor Freight, Inc., 159 Pac. (2d) 317	13
Collins v. Collins, 46 Ariz. 485; 52 Pac. (2d) 1169, 1173	7
Consolidated Copper Co. v. Conwell, 190 Pac. 88, 90; 21 Ariz. 480.....	21
Cox v. Enloe, 70 Pac. (2d) 331; 50 Ariz. 201.....	31
Dennis v. Maher, 84 Pac. (2d) 1029.....	16
Friedman v. Friedman, 9 Pac. (2d) 1015, 1017.....	14
Greenfield v. Bruskas, 68 Pac. (2d) 921, 926.....	21
Hines v. Gale, 25 Ariz. 65; 213 Pac. 395, 397.....	7
McIver v. Allen, 33 Ariz. 28; 262 Pac. 5.....	14
Moeur v. Farm Builders Corp., 35 Ariz. 130; 274 Pac. 1043	7

	Page
Nichols v. City of Phoenix, 202 Pac. (2d) 201.....	19, 20
Perazzo v. Ortega, 32 Ariz. 154; 256 Pac. 503.....	7
Pettes v. Jones, 66 Pac. (2d) 967, 972.....	13
Reed v. Real Detective Pub. Co., 162 Pac. (2d) 133; 63 Ariz. 294	14
Smith v. Normart, 75 Pac (2d) 38; 51 Ariz. 134.....	14
Standard Oil Co. of Calif. v. Shields, 58 Ariz. 239; 119 Pac. (2d) 116, 119.....	34
Stewart v. Schnepf, 62 Ariz. 440, 444; 158 Pac. (2d) 529	7
United Verde Copper Co. v. Wiley, 20 Ariz. 525; 183 Pac. 737, 738.....	34, 35
West v. Jaloff, 232 Pac. 642, 645; 36 A. L. R. 139.....	24
Western Truck Lines v. Barry, 78 Pac. (2d) 997; 52 Ariz. 48	27

Texts

Blashfield's Cyclopedia Auto Law, Vol. 4, Part 1, Sec. 2163, Page 114.....	27
Restatement of Conflicts of Laws, Secs. 380, 383	11, 14, 22
11 Am. Jur., 522	7
15 Am. Jur., Damages Section, Page 621.....	37
38 Am. Jur., 717.....	20
54 Am. Jur., 981	13
45 C. J., Sec. 92, p. 712.....	28
45 C. J., Sec. 865, p. 1310	28
5 C. J., Secundum, Sec. 1650, pp. 640-645.....	33

In the
United States
Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

GEORGE RUMEH,

Appellee.

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

No. 12237

Upon Appeal from the District Court of the United
States for the District of Arizona.

APPELLEES' ANSWERING BRIEF

In this brief, as in the opening brief heretofore filed by appellant, the appellees will refer to the parties to this appeal by their designations in the District Court of the United States for the District of Arizona, viz., appellant as defendant and appellees as plaintiffs.

All figures in parenthesis refer to pages of the transcript of record, unless otherwise expressly identified.

I.

JURISDICTIONAL STATEMENT

The appellees concur in the jurisdictional statement as set forth on pp. 2 and 3 of the appellant's opening brief.

II.

STATEMENT OF CASE

The appellees concur with the statement of the case as set forth in appellant's opening brief down to the sentence on page 6 of the appellant's opening brief reading as following:

“The driver of the Ford apparently never applied a brake (145)”.

We are unable to concur with this statement nor with the appellant's conclusions as to the remaining so-called pertinent undisputed facts.

As to whether or not the driver of the Ford automobile involved in the collision which is the basis of this case ever applied his brakes, we believe that question was succinctly answered by Captain Salas in his testimony as follows (145):

Q. (By Mr. Baker): "From your experience as a highway patrolman, would you say that Ford car ever applied its brakes or ever made an attempt to stop?"

A. "I cannot say as to that; *that is one thing we will never know.*" (Emphasis supplied.)

Plaintiffs do agree that there was physical evidence on the highway showing the point of impact between the Ford and bus; that such point of impact was at the south edge of the pavement, and that it was a distance of 144 feet from the point of impact to the front end of the bus at the point where the bus finally came to a stop; and in view of the testimony of the driver of the bus, Cody Bach (272), that he was thrown from the bus at the time of impact, we can concede that there was in all probability no application of the brakes after the time of impact. However, to say that the bus "rolled free" for a distance of 144 feet when it was pushing a 3000-lb. Ford automobile in front of it for that distance and crushing the automobile under it in the process seems to plaintiffs as too great an exaggeration to be worthy of consideration.

Defendant omitted from the pertinent undisputed facts the testimony of Viola B. Tuck (108) that there were dual wheel skid marks on the pavement about "a city block" prior to the point of impact. She also testified that there was physical evidence on the highway at the point of impact. The distance of a "city block" as used by Mrs. Tuck in her testimony was later determined to be about 260 feet (121). This testi-

mony of Mrs. Tuck fits in closely with the statement made by the driver of the bus, Cody Bach, to Captain C. J. Salas shortly after the collision (139) that he had observed the oncoming car at a distance of approximately 300 feet. It may be readily inferred that the natural act of the driver at that time would be to apply the brakes of his bus. This inference is strengthened by the further testimony of Mrs. Viola B. Tuck (102) that a violent application of the brakes on the bus prior to the impact of the bus with the automobile threw her against the seat in front of her and broke her teeth. This very definitely shows that the bus driver did see the oncoming car acting in an unusual manner at a distance of at least 260 feet before the point of impact, when the other car, approaching at a "fast rate" (270), must have been more than 500 feet distant.

The testimony of Lt. Howard Jones was undisputed, and according to the formula testified to by Lt. Jones (160), had the bus been travelling at a speed of 70 miles per hour it could have been stopped within a distance of 245 feet—an ample distance to have completely avoided the collision; and it requires no stretch of the imagination to realize that had the bus been hit by the Ford automobile when the bus was at a standstill, the plaintiffs would not have suffered the injuries of which they complain.

Plaintiffs agree that there is no evidence but that the bus was at all times travelling on the right side of the center line of the road. From the testimony of the

defendant's witness, William M. Boone (253), it would appear that the Ford car came toward the bus "on a long arc", and not at any sharp angle as suggested by counsel for defendant.

The pertinent undisputed facts then, the plaintiffs contend, indicate that the bus was travelling at such a terrific rate of speed that after the brakes were applied it travelled a distance of 260 feet, collided with the oncoming Ford car, which weighed approximately 3000 lbs., and then pushed that car a distance of 144 feet before coming to a stop off the paved highway.

Defendant's statement that plaintiffs will continue to contend the collision and their resulting injuries were caused by the greatly excessive speed of the bus is absolutely correct. However, the plaintiffs also contend that not only was the excessive and illegal speed of the bus a proximate and contributing cause of the collision and the injuries to the plaintiffs, but that the conduct of the driver of the bus in not properly attempting to bring the bus to a stop, when he saw danger approach from 300 to 500 feet ahead on the highway, was certainly a contributing and proximate cause of the collision and the plaintiffs' severe injuries.

Plaintiffs concur with the balance of the statement of the case as made by the defendant, from the sentence on page 7 of appellant's opening brief which reads as follows:

"Defendant at the close of plaintiff's testimony and again at the close of all testimony of

plaintiffs and defendant, moved the Court to direct a verdict in favor of the defendant on the following grounds:”

to the end of appellant’s statement of the case on page 8 of appellant’s opening brief.

III.

ARGUMENT

I. Plaintiffs Failed to Establish Any Act Upon the Part of the Defendant Sufficient to Constitute Actionable Negligence.

Under this heading the defendant contends that the plaintiffs failed to establish any act upon the part of the defendant sufficient to constitute actionable negligence. The defendant admits that it was bound to exercise as high a degree of care, skill and diligence in transporting the plaintiffs to their destinations as the means of conveyance employed and the circumstances of the case permitted. However, it is the contention of the defendant that there was not sufficient evidence introduced to warrant the jury in finding that the defendant was guilty of a breach of its duty to exercise this highest degree of care. In approaching the problem this court is to be guided by certain general rules of law, all of which tend to substantiate the verdict, viz.:

1. “In considering the motion for instructed verdict at the close of the whole case, it was the duty of the court to appraise the evidence at its

highest value in favor of the plaintiff. The effect of such motion was to admit the truth of all competent and relevant evidence introduced, tending to sustain plaintiffs' cause of action, whether offered by plaintiff or defendant." *Hines v. Gale*, 25 Ariz. 65, 213 Pac. 395, 397.

2. That a verdict will not be disturbed on appeal because it is against the weight of evidence. *Perazzo vs. Ortega*, 32 Ariz. 154, 256 Pac. 503.

3. And if the verdict is supported by any reasonable evidence, the verdict will not be disturbed because there is a conflict in the evidence. *Arizona Cotton Oil Co. vs. Thompson*, 30 Ariz. 204, 235 Pac. 673.

4. Where evidence is of such nature that either of two inferences may be drawn therefrom, the appellate court is bound by the inference chosen by the trial court or the trial jury. *Collins vs. Collins*, 46 Ariz. 485, 52 Pac. (2d) 1169, 1173; *Moeur vs. Farm Builders Corp.*, 35 Ariz. 130, 274 Pac. 1043; *Stewart vs. Schnepf*, 62 Ariz. 440, 444, 158 Pac. (2d) 529.

In citing cases to substantiate the above general rules of law, Arizona cases have been cited in the belief that:

"The quantum of evidence required to take the case to the jury and the right to direct a verdict for insufficiency of the evidence are also usually determined by the *lex fori*". (11 Am. Jr. 522).

However, the preceding four general rules are commonly accepted throughout the country and are well established in all of the appellate courts.

The defendant contends in its brief that the only possible way in which the defendant could have been negligent is in exceeding the speed laws of the State of New Mexico. The defendant seems to "doubt" (page 12 of appellant's brief) if there is evidence sufficient to show the defendant's bus was exceeding the 45 miles an hour speed limit, which is admitted was the governing speed statute in effect at the time and place of the accident. As a matter of fact, the evidence is almost conclusive and without contradiction that the defendant's driver *was* exceeding the speed limit of 45 miles an hour at the time he was confronted with the car coming at him on the wrong side of the road. The evidence of this, in part, is set forth in the following nine paragraphs.

(1) The defendant's bus schedule (plaintiff's Exhibit 4) shows that the defendant was maintaining a schedule calling for an average speed of 50 miles per hour.

(2) The testimony of Cody Bach, the driver of defendant's bus, is to the same effect. We quote from his testimony on direct examination (266) as follows:

"Q. Now, before the time of this accident, at what rate of speed were you traveling, Mr. Bach?

A. You mean before the accident occurred?

Q. Yes.

A. Well, our average speed is 50 miles per hour. Our schedule is set for that, this average speed.

Q. You estimate that is what your were traveling about 50 miles per hour?

A. Well, you would go that fast or sometimes faster, but that is an average speed."

(3) The uncontradicted testimony of Viola B. Tuck is that the bus was 8 minutes late leaving Deming and was on time at the point of the accident 50 miles from Deming (102). This would necessarily mean that the bus' *average* speed from Deming to the point of accident was *considerably* in excess of 50 miles per hour.

(4) The defense attorney attempted to lead the driver of the bus into saying that he had slowed down prior to the accident and had not yet picked up his full speed at the time of the accident. Unfortunately for the defendant, the bus driver, even when conducted along by leading questions, would not deny that he was travelling in excess of 45 miles per hour immediately prior to the accident. (268). The driver's testimony about slowing down prior to the accident is rather vague and must have lead the jury to reasonably conclude that he had picked up the "usual speed" immediately prior to the accident, which would be considerably in excess of 50 miles per hour.

(5) The plaintiffs also contend that the evidence very clearly shows that the driver of the bus had warning that a car was travelling toward him on the wrong side of the road at a time when the bus was still more than 260 feet from the point of impact, or more than 500 feet from the Ford car. (Evidence of this

will be discussed in the following section of the argument pertaining to proximate cause.) Besides being evidence of proximate cause, this evidence would establish either excessive speed, or negligent failure to apply brakes. The evidence of Lt. Howard Jones, who is qualified as an expert upon the braking capabilities of cars and busses, was that if the bus had been traveling 45 miles per hour the bus could have stopped in 101.2 feet (217) at the place of the accident, if its brakes were properly applied; that it could have stopped in 130 feet (217) had it been travelling 50 miles per hour, and, in 180 feet (226) if it had been travelling 60 miles per hour. If the bus driver received warning that a car was approaching him on the wrong side of the road, 260 feet prior to the point of impact, he should certainly have made every effort to reduce the speed of the bus. If the driver did not stop during this 260 feet, it would seem to necessarily follow that *either* he was going too fast to stop, or that he did not properly apply his brakes. From either of these facts the jury would be justified in finding the defendant negligent.

(6) It is the plaintiffs' belief, after listening to all of the evidence, that when the driver first applied his brakes 260 feet from the point of impact he was going so fast that the application of the brakes tended to throw the bus out of control and angled the bus toward the borrow pit (109) and that it was necessary to let up on the application of the brakes so that the bus would have steering way.

(7) The fact that the bus collided almost head-on with a car travelling in the opposite direction at a "fast rate" (according to the testimony of the defendant's driver, 270), took the full momentum of this impact, and then carried this car, grinding it beneath it, for a distance of 144 feet (146), is ample evidence of speed.

(8) The fact that the plaintiff, Rume, was thrown 179 feet through the front of the bus from the point of impact is undeniable evidence of speed (135). Had the driver brought his bus to a stop at the point of impact, Rume would not have been thrown through the windshield and would not have thus received serious injuries.

(9) Captain C. J. Salas of the New Mexico State Police testified that Bach, the driver of the bus, stated immediately after the accident that he, Bach, was driving at the "usual speed" when he first saw the other car angling toward him (139). The usual speed under the facts must necessarily have been in excess of 50 miles per hour.

The defendant, in its brief, seeks to rely upon statements of the Arizona Supreme Court that violation of a speed statute is not in itself negligence per se. It is the plaintiff's contention that whether a breach of the New Mexico speed statute was negligence per se or not, is determined by the law of New Mexico. This seems to be made crystal clear by the authority cited by the defendant in its opening brief, to-wit: Section 380 of the Restatement of the Law of Conflicts. This section, under Sub-section (2) thereof, states as follows:

“Where by the law of the place of wrong, the liability-creating character of the actor’s conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor’s conduct, such application of the standard will be made by the forum.”

Under Comment b of this section the question of negligence per se and breach of statutory duty is discussed:

b. *Negligence per se and breach of statutory duty.*

“If, by the law of the place of the actor’s conduct, the general standard of due care has been defined by judicial decision so as to pronounce certain conduct, as specific acts or omissions, to be or not to be negligent, the forum will apply the standard in the same manner although under the local law the case would have been for the judgment of the jury on the facts in question. So too, if by the statute or other legislative enactment of the state of the actor’s conduct the general standard of due care has been narrowed in a particular situation, the forum will make a similar application of the standard of care although under the local law the case would have been one for the jury because no such statute there existed.”

There is no doubt but that the Restatement is talking about exactly the situation we have here, where the State of New Mexico has defined certain conduct to be negligent, to-wit: the breach of a speed statute. There

seems to be no question but what the violation of a safety statute or ordinance is negligence per se in New Mexico. (*Clay vs. Texas-Arizona Motor Freight, Inc.*, 159 Pac. (2d) 317; *Bell vs. Carter Tobacco Co.*, 41 NM 513; 71 Pac. (2d) 683; *Pettes vs. Jones*, 66 Pac. (2d) 967).

In the *Pettes vs. Jones* case supra at page 972 thereof, we find the following:

“Let it be remembered that we have heretofore been referring to the method of ascertaining the existence of negligence and proximate cause *when no fixed standard of conduct has been prescribed.*”

“The violation of a statutory standard of conduct is negligence per se . . . ; but when any specific act or dereliction is so universally wrongful as to attract the attention of the law-making power, and this concrete wrong is expressly prohibited by law or ordinance a violation of this law, a commission of the specific act forbidden is for civil purposes correctly called negligence per se.”

A United States Court hearing a case where jurisdiction depends on diversity of citizenship will apply the rule of conflicts of laws of the jurisdiction within which it sits. (54 Am. Jur. 981). The law of Arizona is that the liability of a defendant in an automobile personal injury case should be determined by the law of the state where the accident occurred.

“The accident occurred in the State of California, and, while an action of this nature is transitory, and since Maricopa County was the residence

of the appellee, the superior court of such county had jurisdiction thereof, the liability of appellee should be determined, not by the law of Arizona, but by that of California. This is true as to the right of recovery for negligence." (Friedman vs. Friedman, 9 Pac. (2d) 1015, 1017).

The Arizona Supreme Court has also said that in all matters of common law not previously determined by decision in the State of Arizona, that the Restatement of Laws will be followed.

Reed vs. Real Detective Publishing Co., 63 Ariz. 294, 162 Pac. (2d) 133;

Smith vs. Normart, 51 Ariz. 134, 75 Pac. (2d) 38, 114 A. L. R. 1456.

The *Friedman* case, *supra*, and Subsection 2 of Section 380 of the Restatement of the Conflict of Laws, definitely establish that the law of Arizona is that a breach of a New Mexico speed statute, in New Mexico, is to be considered negligence per se in an Arizona court.

The case of *McIver vs. Allen* (33 Ariz. 28; 262 Pac. 5) and *Alabam Freight Lines vs. Phoenix Bakery, Inc.* (64 Ariz. 101; 166 Pac. (2d) 816) are of very little comfort to the defendant. Both of these cases clearly indicate that if the breach of a speed statute proximately causes an injury, there is negligence to which liability attaches. This question of proximate cause will be taken up in the following section of the argument.

II. The Efficient and Proximate Cause of Plaintiffs' Injuries Was the Negligent Act of a Third Person and Not An Act of the Defendant.

Under this portion of his argument, the defendant contends that the proximate cause of the plaintiffs' injuries was the negligent act of a third person and not an act of the defendant. This, of course, states the defendant's view throughout the case and one which was argued at length to the jury. It is one theory of the case. The plaintiffs' theory of the case was that there were two concurring causes of the accident, one of which was the act of a third person (which, under the facts before the court, cannot be adjudged to be negligent), and the other the negligent conduct of the defendant. The jury, under proper instructions from the court (the defendant had no quarrel with any of the instructions given the jury) held for the plaintiffs. It is now, then, merely a question of whether there was any reasonable evidence from which the jury could find on this question of proximate cause for the plaintiffs.

The case of *Alexander vs. Pacific Greyhound Lines, Inc.*, 65 Ariz. 187; 177 Pac. (2d) 229, is the case which the defendant claims to be undistinguishable from the present case. It is true that there are certain similarities between that case and this. The defendant is the same. The defense attorney is the same. The collision occurs when a car, driving in the opposite direction from the bus, turns over on the wrong side of the road and hits a bus. There the similarity ceases.

In the *Alexander* case the testimony was *undisputed* that the defendant's bus driver had no warning

that the other car was going to swerve into him until it reached within 20 or 30 feet of the bus. In the court's reasoning we find the following statement:

“In the *Dennis vs. Maher* case, Supra, the driver of the vehicle that collided with the bus was on the wrong side of the road as the facts show, but in the instant case the driver of the Essex car was in his proper path and *there was no advance indication that his car was going to leave his side of the road and collide with the bus.*” (Emphasis supplied.)

The *Dennis vs. Maher* case referred to is reported in 84 Pac. (2d) 1029 and is a Washington case, which the Arizona Supreme Court does not disparage, but distinguishes on the facts. In the *Dennis vs. Maher* case a passenger car turned onto its wrong side of the road into the path of the bus. The jury found for the plaintiff. The court held that there was sufficient evidence of speed and sufficient evidence of proximate cause to go to a jury.

The crucial difference between this case and the *Alexander* case is that in the case at bar there is evidence that the bus driver had warning of an impending danger, in sufficient time to avoid the accident, *if* he had been travelling at a lawful rate and *if* he had applied his brakes properly. Evidence of such warning is in part as follows:

(1) The investigating officer, Captain C. J. Salas, testified (139) that the bus driver stated immediately after the accident that the bus driver first noticed the

other car "about 300 feet away", on the bus driver's side of the pavement, "angling" toward the bus.

(2) The testimony of William M. Boone, the defendant's own witness, is destructive of the defendant's theory of the case. This witness does not testify to any sudden turning on the part of the other car. All of his testimony is that the other car came across the pavement in a "gradual arc" (245), or a "long arc" (253).

(3) The witness, Viola B. Tuck, a passenger on the bus, testified that she first became aware of an impending accident by the sudden application of brakes. She was thrown forward to the seat in front of her, knocking her teeth out. After this application of brakes, she raised her head and saw the other car approaching the bus at a distance, which she estimated to be the same as the length of the courtroom. (103, 104, 116). This was later established to be a distance of 65 feet (166). Mrs. Tuck estimated the time between the time she was thrown forward by the violent application of brakes and the time she looked up to see the other car approaching to be "half a minute" (111). This estimate may be high, but it is very reasonable to assume that it took her a matter of several seconds to straighten up against the force of what we must assume to be a rapidly decelerating bus and focus her eyes on the road ahead. 260 feet (121, 166) up the road from the point of impact were dual wheel skid marks on the pavement, angling toward the borrow pit. (109). *These were the only skid marks of this nature in the vicinity*

of the accident, except those right at the point of impact. Certainly the violent application of brakes which broke Mrs. Tuck's teeth left skid marks on the pavement, and by a process of elimination, these skid marks must be the ones 260 feet from the point of impact.

(4) The plaintiff, George Rumeh, testified that prior to the accident he was "lying down", trying to rest, that he was awakened by brakes being "slammed on", that the brakes were held down for "a little while", that he sat up, and that he saw the other car almost upon them (196). It is certainly reasonable to infer that it took Rumeh several seconds to raise up from a partially prone position, and see the car ahead. This testimony again indicates that there must have been skid marks many feet prior to the point of impact, and the skid marks 260 feet from the point of impact must be the ones, as they were the only skid marks near the accident except those at the point of impact.

Any item of the testimony outlined immediately preceding would be reasonable grounds to conclude that the bus driver had warning of the erratic behavior of the other car in such time that if he had been travelling at a lawful speed, and if he had applied his brakes properly the accident would not have happened. The fact that three passengers in the bus (Tuck, Rumeh and Boone) all observed the impending disaster in some detail would seem to be conclusive evidence that the "sudden turning" theory of the de-

fendant's is not true. Passengers do not ordinarily keep their eyes glued on the road, and something must have happened to have attracted their attention long prior to the time the other car is supposed to have approached within the "40, 50 feet" testified to by the driver, Cody Bach, (270), and without any warning "cut it at a three-quarters angle", "sharp as you cut a car" into the bus. This testimony of the bus driver conflicts with the testimony of every other witness to the accident, including the defendant's other witness, William M. Boone, and does not jibe with the physical facts in evidence.

The applicable law pertaining to proximate cause is that the determination thereof is ordinarily a question for the jury. The Supreme Court of Arizona has reiterated this doctrine many times, a very recent case applying this law, handed down in January, 1949, being the case of *Nichols vs. City of Phoenix*, 202 Pac. (2d) 201. This is a case where a third party ran a boulevard stop sign at a speed estimated by various witnesses as between 50 to 65 miles per hour, and crashed into the right rear of defendant's bus, which was travelling on a "through street". The plaintiff was a passenger in the bus, and sued defendant for injuries sustained. The defense was, there as here, that the negligent act of the third party was the sole proximate cause of the accident. A directed verdict was given the defendant in the lower court. The case was reversed and remanded for a new trial, the court holding the question of proximate cause to be for the jury. The court said in part: (middle page 209) :

“If an injury is caused by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other, nor can either party escape liability, so long as his own negligent act is one of the proximate causes of the injury.”

The court, in the *Nichols* case, dismisses the defendant's argument that it should not be held to anticipate an illegal act (running of the boulevard stop sign) of a third party. The court held that it was a jury question as to whether the intervening illegal act of the other car relieved the bus driver of liability. The court quoted from a previous Arizona case, *Apache Railroad Co. vs. Shumway*, 62 Ariz. 359; 158 Pac. (2d) 142, 150; 159 ALR 857, as follows:

“ . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (citing cases). That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored.”

The Arizona court in this *Nichols* case is applying the general law of joint-tort liability, which is stated in 38 Am. Jur. 717, as follows:

“The rule is that when an injury occurs through the concurrent negligence of two persons, and it would not have happened in the absence of the negligence of either person, the negligence of each of the wrongdoers will be deemed a proximate cause of the injury, although they may have acted independently of one another; and both are answerable, jointly or severally, to the same extent as though the injury were caused by his negligence alone, without reference to which one was guilty of the last act of negligence.”

It should be remembered that proximate cause can be proven by circumstantial evidence. This law is stated in the case of *Inspiration Consolidated Copper Co. vs. Conwell*, 190 Pac. 88, 90; 21 Ariz. 480:

“Proximate cause is a question of fact and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence.”

This law applied by the Arizona court is generally also the law of New Mexico. In New Mexico also the question of proximate cause is usually for the jury.

“It (proximate cause) is an ultimate fact, and is usually an inference to be drawn by the jury from the facts proved. It only becomes a question of law when the facts regarding causation are undisputed and all reasonable inferences that can be drawn therefrom are plain, consistent, and uncontradictory.” (*Greenfield vs. Bruskas*, 68 Pac. (2d) 921, 926).

As a matter of fact, the law of New Mexico is apparently even more favorable to the plaintiffs' side of the case than Arizona law. In New Mexico, the breach of a speed statute carries with it the presumption that such breach is the proximate cause of any injury associated with such violation. This law is stated in the case of *Bass Drilling Co. vs. Ray*, 101 Fed. (2d) 316, 321, (10th CCA case arising in New Mexico) as follows:

“ . . . , if the intestate was operating the truck at a speed greater than 45 miles per hour and the jury had so found under proper instructions, that constituting negligence per se on his part, the burden then would have been shifted to plaintiff to show that such speed was not a contributing cause to the injury in order to recover.”

In view of the fact that the law of conflicts is that the law of the place of the injury controls problems of causation, this law of New Mexico would seem to have immediate bearing.

“Whether an act is the legal cause of another's injury is determined by the law of the place of the wrong.” (Sec. 383 Restatement of the Law of Conflicts).

In discussing the evidence of the case, the plaintiff has, for the purposes of argument, divided the evidence into that tending to bear most directly on negligence, and that tending to bear most directly on proximate cause. But, it must be remembered that the problems of negligence and proximate cause are inter-

woven to great extent, and that evidence which tends to establish one, also quite often tends to establish the other. For instance, if the bus was travelling at a speed considerably in excess of the lawful limit, this alone necessarily had effect towards causing or increasing the severity of the plaintiffs' injuries. Also, the evidence which tends to show prior warning of the impending accident tends to show negligence on the part of the driver in not avoiding it.

Summarizing, it borders upon the facetious to argue that the defendant's bus was not exceeding the speed limit immediately prior to the accident. Even the scheduled "*average*" speed of the bus over this portion of its route was in excess of the lawful speed limit. And the evidence is uncontradicted that the bus picked up eight minutes on its schedule in the fifty miles immediately preceding the accident. This would indicate an *average* speed of the bus as being just short of 58 miles per hour over this distance. The bus driver himself was honest enough not to claim that he was not exceeding the speed limit immediately prior to the accident. The bus driver admitted to the officer investigating the accident that he was going at the "usual speed" just prior to the accident. This "usual speed" must be around seventy miles per hour to permit an average speed of 58 miles per hour. The physical facts themselves speak most eloquently of speed. The friction created by the crushing and pushing along of the Ford automobile for 144 feet must be terrific, and more than equal to the full application of all available

brakes. On top of this, the full impact of the other car approaching at a fast rate was completely absorbed by the bus' forward impetus. The degree which the bus was slowed down by the impact is indicated by the fact that human bodies were thrown forward from the bus as far as 179 feet from the point of impact. One cannot look at the pictures of the bus (which are in evidence) taken after the accident, without realizing that the bus was going at a terrific rate of speed. These physical facts speak for themselves. In the case of *West vs. Jaloff*, 232 Pac. 642, 645; 36 ALR 139, the Supreme Court of Oregon had this to say about evidence of speed:

“In fact, this might also be said to be a case where the doctrine of *res ipsa loquitur* in itself would indicate that the machine was being driven at an enormous rate of speed, or at least greatly in excess of 20 miles an hour. It was a machine weighing about 4000 pounds. It collided with a truck, and was shunted off its course, ran nearly across the street, climbed an elevation of about 1 foot, struck the plaintiff, and pushed him through a door which he was endeavoring to open, and continued its course, with the man in front of it, until two thirds of the machine had passed through the front of the building and was inside of the cigar store. This, of itself, was evidence to go to the jury of the fact that the machine was being driven at an exceedingly high rate of speed. There was also other evidence, although contradicted, that such was actually the case.”

And if the bus was travelling at a rate in excess of the lawful speed limit, can an appellate court say as a matter of law that this speed did not contribute to plaintiff's injuries? Under *any* circumstances, this unlawful speed must have had some effect towards increasing the severity of the injuries. But, under the facts in this case, it would seem to affirmatively appear that this particular accident could not have happened if it had not been either for this excessive speed, or the failure on the part of the driver to apply brakes. *All* of the testimony in the case, with the lone exception of the testimony of the driver of the bus, whose testimony must humanly be colored to some extent, would lead one to believe that the Ford car started across the road in a long arc when the bus and car were between 180 and 500 yards apart. The skid marks on the pavement, approximately 260 feet from the point of impact, would be better evidence of distance than any hastily made estimate made by the startled passengers in the bus. These marks are circumstantial evidence that the cars were somewhat more than 500 feet apart when the first application of brakes was made, when Mrs. Tuck's teeth were knocked out, when George Rumeh was aroused from his slumber, and when Mr. Boone's attention was diverted from the conversation he was having with the woman across the aisle (255). All of these witnesses were given sufficient warning of some impending hazard in the road, in time for them to have seen the last portion of the tragedy in full effect. And if the bus driver had been driving at a lawful speed, the warning that was given

would have permitted the bus to come to a complete stop long before the point of impact had been reached, and *there would have been no point of impact*, for the "long arc" of the Ford car would have carried it off the road without damage to the bus or its passengers.

In conclusion, the determination of proximate cause does not call for strained or scientific reasoning. It calls for a common sense determination by a jury of reasonable men under proper instructions from the court. This determination has been had and a jury of twelve substantial citizens has determined that some negligent act on the part of the defendant contributed to the injuries of the plaintiffs. The facts of this case would seem to impel any reasonable man to reach this same conclusion, but, even if this were not the case, even if such conclusion were against the weight of the evidence, that determination is entitled to being sustained unless there is *no* reasonable evidence to support it. The plaintiffs submit that there is certainly no such vacuum of evidence requiring a reversal of this case.

III. The Accident Was Unavoidable as Defendant Was Confronted With a Sudden Emergency and Exercised Its Best Judgment Under the Circumstances.

From the small space given by the defendant to the argument to the effect that the accident was unavoidable because of a sudden emergency, it would seem that defendant's Counsel do not seriously believe the proposition to be a valid one for the consideration of this Court.

Plaintiffs believe that this argument is sufficiently and properly answered by the following:

“Nevertheless, in an emergency, the driver must still continue to exercise that degree of skill, diligence and foresight owed by a carrier to its passengers, and a failure in this regard, even at such a time, is negligence; and, moreover, he must drive in such a manner that he can anticipate and look out (for) and protect his passengers if some emergency arises, and cannot excuse his conduct on the ground of sudden emergency if his own conduct is a contributing cause thereof.”

Blashfield's Encyclo. of Auto Law, Vol. 4, Part 1, Sec. 2163, p. 114.

The following instruction given on the trial of a case and approved by the Supreme Court of the State of Arizona on appeal, we feel, correctly states the law with respect to sudden emergencies:

“I instruct you that the rule that a defendant who is confronted with a sudden emergency is not held to the same calm and correct conduct as if he had not been confronted with any such emergency *applies only in cases where the sudden emergency was not due to the defendant's own negligence.*” (Emphasis supplied).

Western Truck Lines vs. Barry, 78 Pac. (2d) 997, 52 Ariz. 48.

The following statement from *Corpus Juris* further states the law on this proposition:

“A mere necessity for quick action does not constitute an emergency . . . where the situation or the danger calling for such action is one which should reasonably have been anticipated and which the person charged with negligence should have been prepared to meet. . . .”

45 C. J., Section 92, p. 712.

In any event, the question is properly one for the determination of the jury:

“Failure to exercise the most exact judgment in a sudden emergency does not charge one with contributory negligence as a matter of law. The question is one of fact for the jury.”

45 C. J., *Negligence*, Sec. 865, p. 1310.

The proposition is universally conceded and needs no citation of authority that an appellate court will not review the weight of the evidence or determine what verdict should have been rendered thereon; its province being merely to determine whether or not there was sufficient evidence to warrant the verdict.

The testimony of the defendant's own witness, William B. Boone (253), that the Ford automobile came from its own side of the road to the side of the road on which the bus was travelling “on a long arc” is certainly evidence from which a jury could properly find either that there was no sudden emergency created or that if an emergency was created it resulted from the negligent acts and conduct of the defendant's driver, Cody Bach.

IV. The Amounts Awarded Plaintiffs Were Excessive and the Verdicts Were Rendered Under Influence of Passion or Prejudice.

Replying to the contention of Counsel for Defendant that the jury rendered verdicts in favor of the plaintiffs which were excessive and rendered under the influence of passion or prejudice, plaintiffs feel that it will suffice to call this Court's attention to the undisputed testimony as to the injuries suffered by the plaintiffs.

The undisputed testimony adduced upon the trial of this case was that the plaintiff, George Rumeh, suffered a scalp wound (83), a broken nose (83 and 198), fracture of the right humerus at the shoulder joint (83), a fractured rib on both right and left sides (84) and a *reactivation of the tuberculosis* which had been in an arrested stage before the accident. (84). The testimony of Dr. Long on this point is as follows (84):

Q BY MR. CARLTON: What was the result of your examination?

A Well, I found that the old tuberculosis lesion *had been reactivated by the injuries*, and that the fluid in the pleural cavity had increased and the right lung had shrunk and become more incapacitated. (Emphasis supplied.)

And again, Dr. Long testified and replied to a further question (86):

Q BY MR. CARLTON: What did you find on this last examination as regards his tubercular condition?

A Well, his lung was contracted and the tissue that was air-containing tissue when I first saw him has now contracted and there is no air going into it. *His right lung is not functioning at all.* (Emphasis supplied.)

With respect to the fracture of the humerus, Dr. Long testified as follows (91):

Q BY MR. CARLTON: From your examination of him this last week, state whether or not it is your opinion that that condition has improved or has gotten worse or is the same.

A He can move this function of the shoulder joint very slightly, but when he moves this arm the shoulder blade has to go with it. It has to work up and down like a hinge, and a fixation in here, where this femur, humerus, doesn't rotate in the shoulder joint. He has to work the shoulder blade to work the arm to any great extent.

Dr. Long further testified (92) that the injuries from which the plaintiff, George Rumeh, was suffering at the time of the trial of this case were permanent and total.

Defendant's counsel seems to urge upon this Court that any finding that the accident aggravated Mr. Rumeh's prior arrested case of tuberculosis was conjectural and merely a matter of opinion. This leads plaintiffs to cite to this Court the following quotation from an opinion of the Supreme Court of the State of Arizona:

“The jury might have found therefrom [the evidence] that Mrs. Enloe had fully recovered from a case of tuberculosis and that by reason of the accident there had been a recurrence of the disease to such an extent that at the time of trial she was totally disabled from work and that her ultimate recovery was problematical and at best would require a long period of absolute rest and professional nursing.”

Cox vs. Enloe, 70 Pac. (2d) 331, 50 Ariz. 201.

It is difficult to conceive of an injury which could be more serious and more completely disabling than the loss of the use of a lung, and it must be remembered that the undisputed testimony further indicated that the plaintiff, George Rume, had lost as a direct and proximate result of the injuries sustained by him in the accident 90 per cent of the motion of his right arm at the shoulder joint.

Defendant's counsel seems to feel that there was no loss of earnings shown on behalf of the plaintiff, Mr. Rume. Replying to this, we merely refer this Court to the uncontroverted testimony of Mr. Rume (214) to the effect that he had been unable to work from the time of the accident until the time of the trial. He further testified that prior to the accident he had been earning \$250.00 to \$300.00 per month by operating a grocery store in Claypool, Arizona, and the loss of earnings thus indicated, up to the time of the trial, had continued for a period of 31 months and was equal to a sum of from \$7750.00 to \$9300.00.

The verdict awarded Mrs. Rhodes was not in any sense excessive. The evidence conclusively shows that she suffered a broken back, was greatly shocked and bruised, and lost two front teeth as a result of the accident. She has suffered severe pain and discomfort since the time of the accident and under the evidence her physical condition has become progressively worse. She has expended approximately \$690.00 for medical care and unquestionably will spend substantial sums for continued medical treatment in the future. Because of her injuries she will be unable to attend to her household duties or perform any work of any consequence.

The X-ray pictures disclose a misplaced vertebra or a condition of spondylolisthesis. Dr. Secrist testified (179) that, "This is severe spondylolisthesis, the slipping of one vertebra on one below." Both Dr. Thomas (175) and Dr. Secrist (179) testified that her back condition was sufficient to cause the soreness and pain of which she complains.

Prior to the time of the accident, Mrs. Rhodes was a housewife and mother and of the age of 45 years, with a life expectancy of 26.72 years. The sum of \$11,000.00 is certainly not excessive in her case. The X-ray pictures are mute evidence of the seriousness of her condition and prove beyond question that she suffered serious and permanent injuries as a result of the accident. Both plaintiffs have been seriously and permanently injured as a result of the negligence of the defendant.

We respectfully submit that the court should not disturb the province of the jury in its duty of assessing damages, unless the damages are so excessive as to appear to the court as being unreasonable and outrageous and such as manifestly shows the jury to have been activated by passion and prejudice.

Counsel for plaintiffs see nothing in the size of the verdicts which bears the earmarks of a quotient verdict as suggested by defendant's counsel. Neither does the size of the verdicts indicate that the jury was acting under the influence of passion and prejudice.

Corpus Juris Secundum has stated the general rule on the measure of damages as follows:

“A finding of value or the amount of damages is so much a matter within the exclusive province of the jury that it will ordinarily not be disturbed by the reviewing Court where the issue had been fairly submitted under proper instructions, unless palpably without support in the evidence presented at the trial unless the jury have departed from the legal measure of damages, or unless the verdict is so palpably excessive or grossly inadequate as to indicate bias, passion, prejudice, corruption, outside influence, or mistake, or shock the conscience or sense of justice, or unless manifest error therein otherwise appears. The rule is particularly applicable where the recovery is based on conflicting evidence, where the amount of the verdict is justified or supported by the evidence, or has been approved by the trial court.”

5 C. J. Secundum, Section 1650, pp. 640-645.

Our Supreme Court in the case of *Standard Oil Company of California vs. Shields*, 58 Ariz. 239, 119 Pac. (2d) 116, 119, sets forth the items of damage which may be recovered in a damage action such as this, as follows:

“The damages permissible in a case of this nature may be divided legally into three classes, (a) out of pocket expenses for past and prospective medical and other items rendered necessary by the accident, and damages to plaintiff’s automobile. These may be calculated with reasonable certainty; (b) loss of earning power by reason of injury, which may be calculated on an evidentiary basis, although not always with the same certainty as the first class; and (c) pain and suffering, past and prospective. This last, of course, is an item for which no definite rule of estimation may be given and, therefore, a great amount of discretion may, and properly should, be left to the jury.”

The Arizona case of *United Verde Copper Co. v. Wiley*, 20 Arizona, 525, 183 Pac. 737, 738, expressed itself on the amount of damages to be awarded for pain and suffering in the following language:

“... we think the rule laid down by Chancellor KENT in *Coleman vs. Southwick*, 9 Johns (N. Y.) 45, 6 Am. Dec. 253, is controlling. He said:

“ ‘The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or cor-

ruption. In short, the damages must be flagrantly outrageous and extravagant or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess'." (Emphasis added.)

The court in the *United Verde* case after setting forth this rule, then quoted with approval the following comment upon the rule from the case of *Chicago, R. I. and P. Ry. Co. v. De Vore*, 43 Okla. 534, 143 Pac. 864 L. R. A. 1915F 21:

"We think this rule is sound, for the reason the jury and the trial judge have a much better opportunity than do the appellate judges to measure the actual damages suffered by the plaintiff and the amount which would compensate him for the injury. They have an opportunity of seeing the plaintiff and to discern his manner of testifying, his intelligence and his capacity, to note his physical condition, and many other living evidences bearing upon the issue, including all the attending circumstances, of the larger part of which the appellate court is deprived. The jury, thus being in possession of all the facts and circumstances, is required to pass upon this issue as an issue of fact, under an appropriate charge of the court as to law. Their solemn finding, returned into court and approved by the trial court, should not be disturbed by this court, unless it comes within the rule hereinbefore laid down. The trial judge has not only the opportunity afforded the jurors to gain knowledge of the conditions of the plaintiff's injury, and the amount which will compensate him,

together with all the facts and circumstances surrounding his injury, but he also has the opportunity of observing the jurors in considering said cause, and of any outward feeling evidencing passion or prejudice that may be exhibited during the proceedings before him; and if it is made reasonably to appear that the verdict of the jury is excessive, by reason of any influence of passion or prejudice, it becomes his sworn and solemn duty, as a trial court, to set aside the verdict or require a remittitur to be filed. After he has considered this point on a motion for new trial, and approved the verdict by overruling the motion, the appellate court should never disturb the finding and judgment of the trial court, except for the gravest reasons, wherein it clearly appears that the trial court has abused its discretion, or that the verdict is excessive within the rule herein stated. Quotations from many courts show this rule to be sound and in harmony with the weight of authority, and based upon reason and justice."

It seems futile to cite to this court any of the multitude of cases in which verdicts considerably greater than the awards made in this case have been sustained by reviewing courts as not excessive. Comparison with prior judgments supplies no valuable basis for determination of the question because each case must stand on its own facts and no two cases are alike. There is, however, nothing in the evidence in this case indicating that these verdicts are excessive.

In determining the amount of an award a jury may take into consideration the value of money at the time of the trial and the general state of inflation or deflation as the case may be. This proposition is clearly set forth in *15 American Jurisprudence, Damages Section*, Page 621, as follows:

“In personal injury actions the courts have for a long time, in passing upon objections of excessiveness or inadequacy of the damages allowed and in comparing present and past verdicts for similar injuries, given consideration to the increased cost of living and the impaired purchasing power of money. They have, when the matter was pressed upon their attention, and frequently upon their own initiative, quite uniformly recognized the validity of this consideration both as regards the ultimate question of excessiveness or inadequacy of the damages allowed by juries in current actions for personal injuries and as affecting the use of, and basis of comparison with, rulings as to damages in earlier cases. As has been said, compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. A sum of money that was fair compensation in value for given injuries when money was dear and its purchasing power was great will not suffice when money is cheap and its purchasing power is small. Increased cost of living or diminished purchasing power of money has not only been rec-

ognized as a proper matter for consideration by the court in passing upon a verdict attacked as excessive or inadequate, but has also been held to be a proper matter for the consideration of the jury in reaching a verdict in the first instance."

We feel that this court will take judicial notice of the fact that money and its purchasing power is today only about $\frac{1}{2}$ of what it was ten years ago.

In determining whether or not a verdict is excessive it must be borne in mind that the jury cannot be expected to determine the amount of the award with the precision of mathematical computation. Every case must stand or fall upon the facts of that particular case and it is universally conceded that Appellate Courts are very reluctant to review the findings or to review the propriety of an award by a jury who has had the opportunity to listen to the testimony, to see the condition and appearance of the parties and to examine and analyze the demeanor and composure of the parties and their witnesses while on the stand. The trial court heard the evidence, saw the witnesses, and listened to counsel's arguments on these same matters and has denied all of defendant's contentions set forth in its appeal.

In conclusion it is submitted that there was introduced in evidence at the trial of this action evidentiary facts from which the jury could reasonably conclude that some negligent act of the defendant was a contributing cause of the plaintiff's injuries. The transcript of record is replete with such evidence. The

amounts of the verdicts returned, in light of the severe injuries sustained by both of the plaintiffs are certainly not so disproportionate as to call for modification by an appellate court. The verdicts rendered by the jury and the judgment rendered by the trial court should be sustained in toto.

Respectfully submitted,

KRUCKER & EVANS,

DAVID J. SMITH,

57 North Church,

Tucson, Arizona,

Attorneys for George Rume, Appellee.

HALL, CATLIN & MOLLOY,

1010-1013 Valley Nat'l. Bldg.,

Tucson, Arizona,

Attorneys for Bertha Lucille Rhodes, Appellee.